



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS
Washington, D.C. 20231
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/675,825	09/29/2000	Jessica A. Aldrich	NU-98-5-1 (205-14)	9516

7590 06/06/2002

Michael W. Ferrell, Esq.
Ferrell & Ferrell L.L.P.
Suite 401
90 Crystal Run Road
Middletown, NY 10941

EXAMINER

HENDRICKS, KEITH D

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 06/06/2002

8

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)
	09/675,825	ALDRICH ET AL.
	Examiner Keith Hendricks	Art Unit 1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 15 March 2002.
- 2a) This action is FINAL. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-20 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) The proposed drawing correction filed on _____ is: a) approved b) disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All b) Some * c) None of:
1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) The translation of the foreign language provisional application has been received.
- 15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 15 remains rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 15 appears to improperly extend the limitations of claim 14 from which it depends, as "oligofructose" is not one of the recited options in part (e) of claim 14. Applicants state that "oligofructose is defined as an oligosaccharide on page 11, Table 1" of the specification. However, again, claim 14 states that the oligosaccharide is "selected from the group consisting of inulins and fructans." While inulin is made almost entirely of oligofructose (aka fructooligosaccharides), reference to the specification at page 7, line 9 of the specification shows that "a distinction is made between inulin and oligofructose", i.e. inulin comprises oligofructose, but is not oligofructose, *per se*.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 1-3, 11 and 20 are rejected under 35 U.S.C. 102(a) as being anticipated by Hoek et al. (WO 98/02049, of record).

Hoek et al. discloses "stable, liquid suspensions containing a dipeptide sweetener in water", an edible sweetening acid, wherein the liquid is also contains a water-soluble polysaccharide, protein or lipid with surfactant properties at a pH of 3.5 or lower (abstract; pg. 8-12). The exemplified dipeptide sweetener is aspartame. Pages 8-9 state that the water-soluble polysaccharide may be, among others, cellulose, methyl cellulose, or hydroxymethyl cellulose, which are polysaccharide fibers made of glucose units. Page 11 states that additional sweeteners such as fructose and fructose syrups may be included. Thus, as the low-pH environment naturally breaks down cellulose fibers via acid hydrolysis (a well-known, natural reaction), and since cellulose is comprised of glucose units, this would inherently serve to

Art Unit: 1761

sweeten the beverage. Page 10 of the reference states that the suspension is rendered stable in low pH, whereas in the prior art compositions, "aspartame when used in concentrated syrups for fountain-dispensed drinks is susceptible to accelerated decomposition in connection with the low-pH environment."

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-20 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Mitchell, and Wiedmann et al., in view of the combination of Yatka et al. and Nakel et al. The references and rejection are taken as cited in a previous Office action.

Applicant's arguments filed March 15, 2002, have been fully considered but they are not persuasive. At page 6 of the response, applicants state that "the monomeric hydrolyzed units of the oligosaccharides are much sweeter than the oligosaccharides themselves, and therefore the loss of sweetness due to the degradation of peptide sweetener is compensated for." Applicants state that "there is no suggestion in the art of this discovery."

This is not deemed persuasive for the reasons of record. Initially, the "discovery" of a property of a composition, whether it is true that applicants "discovered" it or not, is not synonymous with an "invention". The fact that applicants may have recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985). Further, as previously stated on the record, Mitchell states that aspartame becomes unstable under acidic conditions, and that the compositions of Mitchell interact synergistically to stabilize the functional groups of these peptide sweeteners, thus providing for "improved shelf-life and stability of aspartame." The compositions include inulin from chicory or Jerusalem artichoke powder, for example, and aspartame. Yatka et al. discloses the fact that oligofructose stabilizes aspartame in chewing gum compositions.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (703) 308-2959.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached at (703) 308-3959. The fax phone number for the organization where this application or proceeding is assigned is (703) 305-3602.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.



KEITH HENDRICKS
PRIMARY EXAMINER